CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 432

AETNA CASUALTY & SURETY COMPANY AND J. A. JONES CONSTRUCTION COMPANY, PETITIONERS,

vs.

MRS. FANNIE M. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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vs.

MRS. FANNIE M. FLOWERS

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[fol. 1]

IN THE CHANCERY COURT OF HAWKINS COUNTY, TENNESSEE

ORIGINAL BILL—Filed May 24th, 1945

To the Honorable J. H. Wallace, Chancellor, Holding Chancery Court at Rogersville:

MRS. FANNIE M. FLOWERS, in her own right, and for the use of her minor children, Thomas and Clarence Flowers, residents of Hawkins County, Tennessee, Petitioners,

vs.

AETNA CASUALTY AND SURETY COMPANY, a foreign corporation doing business in Tennessee, with an office and/or agents in Hawkins County, Tennessee; and J. A. Jones Construction Company, a foreign corporation doing business in Tennessee with offices and agents in more than one county in said State, especially an office and/or agency in the City of Knoxville, Knox County, and a Post office address and Post office Box 299, Defendants

I

Petitioner will show to the court:

That the defendant Construction Company is engaged in construction work and other work in behalf of the Federal Government, supplying munitions of war or other essential war material of a secret nature, unknown to the public, including its employees, over a large and undefined territory in Tennessee, and under a contract with the department of the Federal Government which contract, in compliance with the Federal Laws, requires the defendant provide compensation to its employees under State Workmen's Compensation laws. And was so engaged on and [fol. 2] before March 8th, 1945.

That the defendant Aetna Casualty and Surety Company was then and is now its insurer, under the State Workmen's Compensation Law and as such, under the state laws made jointly and severally liable along with the employer for any claims arising under said law.

That on March 8th, 1945, Edward E. Flowers, husband of the Petitioner and father of their two named minor children, aged 15 and 12 years respectively, was in the employment of the said contracting company as a carpenter and had been for an unknown period of time and that he and said defendant company had accepted and were working under the provision of the Tennessee Workmen's Compensation Law.

II

And on said day, namely March 8th, at about 3:45 P. M., while the said Edward E. Flowers was engaged in his labor for and assigned to him by the employer, working upon a scaffold or platform, he suffered injuries due to accident arising out of and in the course of his employment which accident was the direct and proximate cause of his death by falling from said platform and/or steps or ladder leading from the ground to said platform, into a concrete pit, from a height of many feet. And as a direct consequence of the accidental fall he suffered mortal injuries to his head, skull, neck and spine, from which he died before he could be moved to an emergency hospital.

And it is alleged that his exertions in his work immediately before the fall contributed directly to bringing about his physical condition and was a concurring cause in his accidental fall into the pit; and also, his falling into the concrete pit concurred and directly contributed to his injuries sustained by striking the hard surface of the pit which caused his death; all of said contributing and concurring [fol. 3] causes of the accident arose out of and in the course of his employment.

It is alleged he suffered a long and bloody head wound, leaving a large and gaping gash and a fractured skull together with the aforesaid injuries, anyone of which could have, and taken together, would cause his immediate death.

More specific details of the injuries and the causes are unknown to the petitioner, but the facts of the accident and the injuries were known or should have been known by the defendants since the accident happened upon its premises and in the presence of its employees and foreman and they took charge of the injured man immediately. The petitioner was not present and had no one there representing her or whom she knew and who would relay the facts to her.

Upon being notified she sent for the body of her deceased husband a distance of about 100 miles from her home, but the employer declined to release the body and she was required to make a trip there in person, when a demand was made of her by the employer for the right to hold a post mortem as a condition for the release of the body, and as an inducement in addition to the release of the body she was told that the result of the examination would make it more easy for her to collect compensation. Upon these inducements she consented, but she had no physician present representing her and she was not advised she had this right and by this conduct on the part of the employer she was denied the right of a qualified check upon the finds of the examination and she never has been furnished with a copy of the employer's experts' report upon the examination.

She was ignorant of the 30 days' notice to the employer, but a short while after the expiration of the 30 days, she gave the defendant the statutory notice by registered mail, a written registered receipt being requested and it was [fol. 4] received and duly signed by a person authorized to receive and receipt for the company's mail, all of which will be shown at the hearing. However, it is alleged that no formal notice was required under the shown facts for the defendant was fully advised with knowledge that the defendant was not in a like advantageous position to know the facts, and that the company acted upon the facts known to it and the formal notice could serve no useful purpose.

III

The petitioner has no exact knowledge of the weekly average wage, including overtime wages, earned by the deceased, whom she believes to have been in the employment of the defendant for a period longer than one year. The payrolls of the defendant company will establish the weekly average and it is called upon to produce the records along with its answer, or to decline, in order that she can take steps to procure them before the hearing.

It is alleged that 60% of his average weekly wages over the statutory period of payment is in excess of the maximum sum of $5,000.00, which she is permitted to recover and for this reason she sues in her own right and on behalf of her said minor children for said sum, together with the statutory burial fund allowed.

And she asks the Court to fix the fees of her attorney as contemplated by the Statute.

IV

Premises Considered, Petitioner Prays:

1

That the defendant Aetna Casualty & Surety Company be made a party defendant by the issuance of process directed to the Sheriff of Hawkins County, to be served upon its local [fol. 5] agent, and that counterpart process be issued to the Sheriff of Knox County to be served upon the co-defendant J. A. Jones Construction Company Incorporated, through its local office there, and that both defendants be required to answer the petition in the time required by law under the rules of this Court, but their oaths to their answers are expressly waived.

2

That upon the hearing the Court determine and find that the employee Edward E. Flowers sustained the accidental injuries while in the employment of the defendants, which injuries were the direct concurring and contributing proximate cause of his accidental death and were sustained in the course of his employment and arose out of the same; and that the petitioner is entitled to recover on her and her children's behalf the maximum sum allowed under the law, which sum *if* less than 60% of his weekly average wages and that she recover the burial expenses in the sum fixed under the Statute from the defendant or either of them, and the costs of the cause.

3

That she have all other, further and general relief.

(Signed) Fannie M. Flowers.

Portrum & Portrum.

STATE OF TENNESSEE,
Hawkins County:

The Petitioner, Fannie M. Flowers, being duly sworn, makes oath that the contents of her petition are true to the best of her knowledge and belief, and that due to her

poverty she is unable to bear the expenses of this suit and she verily believes that the redress sought is just.

(Signed) Fannie M. Flowers.

Sworn to and subscribed before me this 24th day — [fol. 6] May, 1945. (Signed) Juno G. Altom, Clerk & Master. (Seal.)

[fol. 7] IN THE CHANCERY COURT OF HAWKINS COUNTY

SUBPOENAS TO ANSWER AT RULES IN CHANCERY AT ROGERSVILLE, TENNESSEE

Issued 24th day of May, 1945, (Signed) Juno G. Altom, Clerk & Master.

No. 1565

Came to hand on the 24th day of May, 1945, and was executed by reading the same to Lawrence Rolfe, as the agent for defendant Aetna Casualty & Surety Co., and leaving a certified copy of the original bill in the hands of Lawrence Rolfe, Agent.

This 26th day of May, 1945.

(Signed) James Carpenter, Deputy Sheriff.

STATE OF TENNESSEE,
Chancery Court at Rogersville.

To the Sheriff of Hawkins County, Greeting:

Summon Aetna Casualty & Surety Company (certified copy of bill attached) if to be found in your county, to appear in person or by attorney before the Chancery Court at Rogersville on or before the first Monday of June, 1945, it being Rule Day of said Court, to answer the Original Bill which Mrs. Fannie M. Flowers has filed in said Court against it and others, and have you then and there this writ.

Witness, Juno G. Altom, Clerk & Master of our said Court, at office in Rogersville, Tennessee, this 24th day of May, 1945.

(Signed Juno G. Altom, Clerk & Master.

Notice

To the Above Named Defendant, Aetna Casualty & Surety Company:

You are hereby notified that you are required to make defense in this case on or before the Third Monday of June, or judgment pro confesso will be entered against you on the Third Monday of June, 1945.

(Signed Juno G. Altom, Clerk & Master.

[fol. 8] Counterpart Subpoena to Answer at Rules, in Chancery at Rogersville, Tennessee

No. 1565

Issued May 24th, 1945, Juno G. Altom, Clerk & Master.

Came to hand on the 4 day of June, 1945, and was executed by reading the same to V. N. Hacker, Emp. Supervisor, and leaving a copy of the Original Bill in the hands of V. N. Hacker, Emp. Supervisor for J. A. Jones Construction Co.

This 4 day of June, 1945.

(Signed) Hazen Kreis, Sheriff, by Henry Bryant, Deputy Sheriff.

Counterpart

State of Tennessee,

Chancery Court at Rogersville, Tennessee.

To the Sheriff of Knox County, Greeting:

Summon J. A. Jones Construction Company (certified copy of the original bill accompanying this writ) if to be found in your county, to appear in person or by attorney before the Chancery Court at Rogersville on or before the First Monday of June next, it being Rule Day of said Court, to answer the Original Bill which Mrs. Fannie M. Flowers etc., has filed in said Court against Aetna Casualty & Surety Company, et al., and have you then and there this writ.

Witness Juno G. Altom, Clerk & Master of our said Court, at office in Rogersville, Tennessee, this 24th day of May, 1945.

(Signed Juno G. Altom, Clerk & Master.

Notice

To the Above Named Defendant, J. A. Jones Construction Company:

You are hereby notified that you are required to make defense in this case on or before the Third Monday of [fol. 9] June, 1945, or judgment pro confesso will be entered against you on the third Monday of June, 1945.

(Signed) Juno G. Altom, Clerk & Master.)

[fol. 10] In the Chancery Court of Hawkins County

Notice of Filing Petition for Removal—Filed May 29, 1945

To Mrs. Fannie M. Flowers and to Portrum & Portrum, Her Attorneys:

You are hereby notified that Aetna Casualty & Surety Company and J. A. Jones Construction Company, the defendants in the above entitled cause, will, on the 29th day of May, 1945, file in said cause its petition for removal of said cause to the United States District Court for the Eastern District of Tennessee, Northwestern Division, together with its bond for removal, a copy of which is attached hereto, and that at 9:00 O'Clock A.M. on said date, or as soon thereafter as counsel can be heard, we will present to the Honorable J. H. Wallace, Chancellor, at his chambers in Clinton, Tennessee, the said petition and bond, and move for an entry of an order removing said cause aforesaid.

This 28th day of May, 1945.

(Signed) Clyde W. Key, Counsel for Petitioners.

Service of the foregoing notice was had by mailing copy thereof by United States mail, postage prepaid, to Portrum & Portrum, attorneys for the plaintiff, on this the 28th day of May, 1945.

(Signed) Clyde W. Key, Counsel for Petitioners.

[fol. 11] In the Chancery Court of Hawkins County.

PETITION FOR REMOVAL—Filed May 29, 1945

[File Endorsement omitted]

The petitioners, Aetna Casualty & Surety Company and J. A. Jones Construction Company, respectfully show unto the Court:

1. That they are the sole defendants in the above entitled action, now pending in the Chancery Court of Hawkins County, Tennessee; that your petitioners, as such defendants, are required to appear and make defense to the petition filed herein on the first Monday of June, 1945, and that the time therefor has not expired.

2. That the cause of action stated in plaintiff's original petition is this:

That on or about the 8th day of March, 1945, the plaintiff's husband, E. E. Flowers, was an employee of the petitioner J. A. Jones Construction Company; that on the date aforesaid, both said employer and employee were operating under and subject to the provisions of the Tennessee Workmen's Compensation Act; that on said date the plaintiff's husband received bodily injuries arising out of and in the course of such employment, which injuries have resulted in his death; that at the time of said injury the average weekly wage of plaintiff's husband was in excess of $30.00, and that on account of said facts your petitioners are indebted to the plaintiff in the amount of $5000.00, and therefore plaintiff has demanded a judgment against your petitioners in said sum of $5000.00.

3. Petitioners further show that the amount in controversy in said cause of action exceeds the sum of $3,000.00, exclusive of interest, penalty and costs, as in plaintiff's original petition is alleged.

4. Petitioners further show that the plaintiff, Mrs. Fannie M. Flowers, at the time of the bringing of said action, and ever since, has been and still is a citizen of the State of Tennessee; that the petitioner Aetna Casualty & Surety [fol. 12] Company, at the time of bringing of said action, and ever since, has been and is a corporation organized and existing under the laws of the State of Connecticut,

and is a citizen of that State; that at the time of the bringing of this suit, petitioner J. A. Jones Construction Company was and now is a corporation organized under the laws of the State of North Carolina, and a citizen of that State; that the controversy in said cause of action is entirely between citizens of different States, and that your petitioners desire to remove said cause from the said Chancery Court of Hawkins County, Tennessee, to the United States District Court for the Eastern District of Tennessee, Northeastern Division, sitting at Greeneville.

5. Petitioners file herewith and present to the Court their bond in the penalty of $500.00, and they pray that the same may be accepted and approved by this Court, and that said cause be removed to the said United States District Court for the Eastern District of Tennessee, Northeastern Division.

(Signed) Clyde W. Key, Counsel for Petitioners.

Duly sworn to by C. W. Key. Jurat omitted in printing.

[fol. 13] IN THE CHANCERY COURT OF HAWKINS COUNTY

[File Endorsement omitted]

ORDER OF REMOVAL—Filed June 5, 1945

The defendants, Aetna Casualty & Surety Company and J. A. Jones Construction Company, having within the time provided by law filed their petition praying for the removal of this cause to the United States District Court for the Eastern District of Tennessee, and having at the same time filed their bond in the penal sum of $500.00, with good and sufficient surety, and conditioned according to law, it is, on motion of counsel for said defendants, ordered, adjudged and decreed:

1. That said petition be and it is hereby accepted, and said bond is approved.

2. That the above entitled cause be removed to the United States District Court for the Eastern District of Tennessee, Northeastern Division, and that all further proceedings in this Court be stayed.

3. The Clerk of this Court is directed to certify and transmit to the said District Court a transcript of all proceedings in this cause in this Court, and to file such transcript with the Clerk of said United States District Court within thirty days from the filing of the petition for removal herein.

Enter,

(Signed) J. H. Wallace, Chancellor.

[fol. 14] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE

MOTION TO DISMISS—Filed June 28, 1945

Come the defendants, Aetna Casualty & Surety Company and J. A. Jones Construction Company, and, entering their appearance herein specially for the sole purpose of making this, their motion to dismiss, move the Court to dismiss this suit and the complaint filed herein, for this:

That at no time has the defendant J. A. Jones Construction Company, a corporation, engaged in business in Hawkins County, Tennessee, nor had therein any officer, director, agent, or any other person upon whom leading process might lawfully be served in said County. The alleged accident forming the basis of plaintiff's cause of action occurred in Roane County, Tennessee, in which County the defendant J. A. Jones Construction Company on the 8th day of March, 1945, and continuously thereafter, has had, and now has, general offices, officers and agents upon whom leading process may lawfully be served. Accordingly, the Chancery Court of Hawkins County, Tennessee, whence this cause was removed to this Court, did not have jurisdiction of plaintiff's alleged cause of action or of these defendants, the venue of said alleged cause of action being limited to Roane County, Tennessee. (Brown vs. Stone & Webster Engineering Corporation, 181 S. W. (2d) 148.)

Wherefore, these defendants move the Court to dismiss this suit.

(Signed) Clyde W. Key, Counsel for Defendants.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND—Filed July 12, 1945

And now comes the plaintiff and moves the Court to remand the above entitled cause to the State Court from which it was removed for trial, for the following reasons:

(1) This is not a removable suit, because not one of a civil nature in law or equity; and the Federal District Court has no original jurisdiction of the subject matter. (U. S. Code, Title 28, Sec. 41; id. 71.)

(2) The jurisdictional grounds of the State Court under the Worwmen's Compensation Law (Acts 1923, Chap. 84; Acts 1943, Chap. 117; Williams' Tenn. Code Sec. 6852, et seq.) is derived through a contractual relationship between the employer and the employee, and is optional with either or both; and by reason of the contractual relationship all contracting parties assume the obligations as well as the benefits of the State Workmen's Compensation Law, one of which is the peculiar procedure provided in State Courts for the determination of the controversy, contrary to the established procedure in any action of a civil nature at law or in equity, requiring the exercise of administrative power. And the employer having voluntarily brought itself within the State Courts' jurisdiction in this compensation case, is estopped to invoke the derivitive jurisdiction of the Federal Court.

(3) The petition fails to allege the Federal Court's jurisdiction of the subject matter as required under the Court's Rules. (General Rules of Pleading, Rule 8 (a), Claims for Relief.)

(4) And taking the allegations of the original bill as a whole, it appears that the Federal Court's jurisdictional amount is not established by the pleadings.

(5) The petitioners for the removal of this cause to this Court fail to comply with the Federal Statutes of [fol. 16] removal. (U. S. Code, Title 28, Sec. 72) and the condition precedent required thereby, in that they failed to comply with this provision, i.e., "Written notice of said petition and bond for removal *shall* be given to the adverse party *prior* to *filing* the same." No prior notice of inten-

tion to file was given adverse party as fully appears from the transcript of the proceeding sent up from the State Court.

Therefore, plaintiff says this Court has no jurisdiction to try and determine this case and prays that same be remanded to the Chancery Court of the Second Tennessee Division sitting at Rogersville, Tennessee, from which it came.

Portrum & Portrum, Solicitors; by Hal E. Portrum, Rogersville, Tennessee.

[fol. 17] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed November 28, 1945

This suit was brought by the widow under the Tennessee Workmen's Compensation Law in the Chancery Court of Hawkins County for benefits under the Act for the death of her husband, whom it is alleged met his death by accident in the course of his employment in either Roane or Anderson County. Service was had upon the local agent of the defendant, Aetna Casualty & Surety Company, with counterpart served on the employer, J. A. Jones Construction Company, in Knoxville, Tennessee, where it has an office and place of business.

The cause was removed to the District Court for the Eastern District of Tennessee, the Northeastern Division, where a motion to remand was made by the plaintiff and a motion to dismiss by the defendants.

Under the Workmen's Compensation Act the employer may be sued where the accident occurred or elsewhere, as provided in the Act, where the employer has an office or place of business, but the employer may not be brought into a county where he has no officer or agent or place of business by serving process upon the insurer. The insurer may be sued under the Act where the insured may be sued, but the insured may not be brought into the insurer's venue by counterpart process.

Since under the authority of Brown vs. Stone & Webster, 181 Tenn., 293, the Chancery Court of Hawkins County was not the proper venue, since the accident did not occur there and since the employer has no officer or place of

business in that county, removal from that court to the District Court for the Northeastern Division of the Eastern District of Tennessee does not confer jurisdiction upon that court. Since it is clearly necessary that the suit be instituted where the venue lies, the question of removability [fol. 18] need not be passed upon, but under the agreed facts since this court has no jurisdiction, by direct method to avoid the consumption of additional time the suit will be dismissed and an order may be prepared for approval and entry.

(Signed) Geo. C. Taylor, Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Entered December 7, 1945

This cause came on to be heard upon the motion of the defendants to dismiss this action upon the ground that the Chancery Court of Hawkins County, Tennessee, whence the suit was removed to this Court, did not have jurisdiction of the cause of action asserted in the pleading; and said motion, being argued by counsel and well understood and considered by the Court, was by the Court sustained.

It is accordingly ordered, adjudged and decreed that plaintiff's suit be and the same hereby is dismissed, and that the plaintiff shall pay the costs of the cause, for which let execution issue.

Approved for entry:

(Signed) Geo. C. Taylor, Judge.

O. K.

(S.) Hal E. Portrum, 12-3-45, Counsel for plaintiff;
Clyde W. Key, Counsel for Defendants.

[fol. 20] IN UNITED STATES DISTRICT COURT

APPLICATION FOR LEAVE TO APPEAL IN FORMA PAUPERIS UPON CERTIFICATE OF GOOD FAITH—Filed January 5, 1946

Mrs. Fannie M. Flowers, complainant, makes application for a cerificate of good faith and leave to appeal *forma pauperis* to the Circuit Court of Appeals (Sixth *District*) from a judgment of dismissal in this case, entered December

3rd, 1945, and in support hereof makes oath to the following facts;

That she is a citizen and resident of Hawkins County, Tenn., and because of her poverty she is unable to pay the costs of said appeal, or to give security for same, and that she believes she is entitled (upon advice of counsel) to the redress she seeks by such appeal; and that the only other persons interested in the cause of action are her two dependent children who share in the compensation sought under the Tennessee Workmen's Compensation Act, and she states that due to their poverty they are unable to pay the costs of the appeal, or to give security for same, and are entitled to the redress sought; and that she has entered into no agreement with her attorney on any contingent basis.

She states she is appealing in good faith as based upon the nature of appeal, to-wit:

This action was instituted in the Chancery Court of Hawkins County, Tennessee, to recover compensation under the Workmen's Compensation Statute, for injury to and death of her husband, against his employer and its insurer. The cause was removed to the Federal District Court by the defendants upon the grounds of diversity of citizenship. She made a motion to remand upon grounds hereinafter reviewed. The defendant filed a plea in abate-[fol. 21] ment in the Federal Court to the jurisdiction of the Hawkins County Chancery Court on the grounds the venue was in Anderson County (should have alleged Roane County), Tennessee, which plea to the State's Court's jurisdiction was sustained by District Judge and suit dismissed; the Court pretermitting the question of its own jurisdiction.

1st. It was error to sustain the plea in abatement to the State Court on the ground of venue. The Compensation Statute, (Williams Code sec. 6885) provides the suit may be instituted in county of the residence of the widow, but the Supreme Court has construed this section pari materia with other sections of venue (Code secs. 8640; 8643; 8669) making it necessary that a defendant must be suable in the county of the widow's residence. Such was the fact here. (154 Tenn. 134). The State Supreme Court gave effect to said provision of the statute, but the District Judge by his decision eliminated the provision entirely, by concluding

the insurer was suable only in the county of the employer, by this conclusion, "The insurer may be sued under the Act where insured may be sued, but the insured may not be brought into the insurer's venue by counterpart process."

This conclusion must have been based upon this provision of the Act, i. e., "All policies insuring the payment of compensation made under the Act, * * * must contain a clause to the effect that as between the employer and the insurer or insurers the notice to our knowledge of the occurance of the injury on the part of the insured employer shall be deemed notice or knowledge, as the case may be, on the part of the insurer or insurers; that the jurisdiction of the insured for the purpose of this Act shall be the jurisdiction of the insurer or insurers, * * *" (Williams Code sec. 6894). This provision pertains to the contents of the policy of insurance protecting the employer, and was not intended as an exemption to either the insured or the insurer of the provisions of the Act in reference to venue. And to construe it as repealing the provisions as to venue and thereby [fol. 22] eliminating entirely the right of the widow to sue in the county of her residence, notwithstanding the insurer is made jointly and severally liable by the Act, and who is suable in the widow's home county, is to bind her by the terms and provisions of the private contract between the employer and insurer, which was not the intent nor the correct construction of the Act. And to so construe it renders the quoted portion of the act unconstitutional, under the State Constitution, for it denies the widow her equal rights others enjoy under the venue laws of the State; and it confers upon the insurer a special right or exemption against suit in a county where is has an office and maintains an agent, while no other in like situation enjoys such special privilege.

2nd. It was error for the Court to pretermit the question of its own jurisdiction, raised by the motion to remand, and dismiss the case upon the question of state practice, because it was insisted the Federal Court had no jurisdiction.

3rd. The Court should have passed upon and sustained the motions to remand for the following reasons:

(1) The District Court has no original jurisdiction, the suit not being one of a civil nature in law or equity.

(2) The State's jurisdiction arises out of contractual relationship assenting to jurisdiction of the State Court.

(3) The Federal Court's jurisdictional amount is not established, the right to recover being contingent.

(4) The defendant failed to comply with the removal statute by failing to give prior notice of the filing of the petition to remove, or to give any legal notice.

The nature of this cause and appeal is based upon the technical record, which is relied upon to establish the bona fides of the applicant.

(Signed) Fannie M. Flowers, Applicant.

Portrum & Portrum, By Hal E. Portrum, Rogersville, Tennessee.

[fol. 23] STATE OF TENNESSEE,
County of Hawkins, ss:

Personally appeared before the undersigned authority, the applicant, Fannie M. Flowers, who states upon oath that the facts stated in the foregoing application are true, except those made upon information as indicates and these she believes to be true.

(Signed) Fannie M. Flowers.

Sworn to and subscribed before me, at office, this 4 day of January, 1946.

(Signed) Kate Watterson, Notary Public. (Seal.)

My Comm. expires April 16, 1949.

NOTICE TO DEFENDANT

To Clyde W. Key, Bank of Knoxville Building, Knoxville, Tenn., Attorney of record of the defendants Aetna Casualty and Surety Company and J. A. Jones Construction Company.

Notice is here given that the within application is filed, and under the practice as directed by the United States Appellate Courts, the Clerk will forward to the District Judge for action as soon as practical the application and an order.

(Signed) Hal E. Portrum, Attorney for Applicant.

[fol. 24] IN UNITED STATES DISTRICT COURT

ORDER CERTIFYING MERIT AND GOOD FAITH OF APPEAL, AND LEAVE TO PROCEED IN FORMA PAUPERIS—Entered January 8, 1946

In this cause Fannie M. Flowers, complainant, has filed application to proceed upon appeal in forma pauperis, supported by the oath of poverty as required by statute, and upon consideration of the application:

It is adjudged the appeal is taken in good faith, has merit, and the applicant is entitled and is given a certificate that the appeal is taken in good faith.

Approved for entry: (Signed) Geo. C. Taylor, District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 14, 1946

Notice is hereby given that Mrs. Fannie M. Flowers, complainant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the judgment of dismissal entered in this action on December 7, 1945.

Portrum & Portrum, By Hal E. Portrum, Attorney for Appellant, Mrs. Fannie M. Flowers, Rogersville, Tennessee.

[fol. 26] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed January 14, 1946

The appellant requests the following parts of the record be included in the record on appeal:

1. The original bill.

2. The subpoena to Hawkins County and the counterpart subpoena to Knox County.

3. Petition for removal.

4. Notice of removal, and service of notice (on accompanying page of notice.)

5. Order of removal.

6. Motion to remand.

7. Motion to dismiss.

8. Opinion of Court.

9. Order of dismissal.

10. Application to appeal in forma pauperis and certificate of good faith containing pauper's oath.

11. Order certifying merit and good faith.

12. Notice of appeal.

Notice is given that the questions relied upon on appeal are reflected in the application and oath showing merit.

Portrum & Portrum, By Hal E. Portrum, Rogersville, Tennessee.

[fol. 27] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—Filed February 11, 1946

The motion of appellant for leave to prosecute appeal in forma pauperis is granted, and appellant is directed to file four legible typewritten copies of record on appeal and of her brief.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CAUSE SUBMITTED ON BRIEFS WITHOUT ARGUMENT—April 2, 1946

Before Allen, Martin and Miller, JJ.

Upon former application, duly approved by this Court, this cause is submitted on briefs without oral argument.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered and filed April 17, 1946

Appeal from the District Court of the United States for the Eastern District of Tennessee

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, and the action remanded to the District Court for further proceedings consistent with the opinion.

[fol. 29] [File endorsement omitted]

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 10200

MRS. FANNIE M. FLOWERS, Appellant,

v.

AETNA CASUALTY & SURETY COMPANY, et al., Appellees

Appeal from the United States District Court of the Eastern District of Tennessee, Northeastern Division

OPINION—Filed April 17, 1946

Before Allen, Martin and Miller, Circuit Judges

MILLER, Circuit Judge:

The appellant complains of the order of the District Court dismissing this action for lack of jurisdiction, which involved the collateral action of the district judge in failing to rule upon the appellant's motion to remand the action to the state court.

The action was filed May 24, 1945, in the Chancery Court of Hawkins County, Tennessee, by the appellant Mrs. Fannie M. Flowers, as the widow of Edward E. Flowers,

suing in her own right and in behalf of two minor children aged 15 and 12 years respectively, to recover benefits under the Workmen's Compensation Law of Tennessee, accruing by reason of the death of her husband on March 8, 1945, resulting from an accident arising out of and in the course of his employment with the defendant J. A. Jones Construction Company, a North Carolina corporation. The insurance carrier, Aetna Casualty & Surety Company, a Connecticut corporation, was also made a defendant. The bill alleged that 60% of the decedent's average weekly wages over the statutory period of payment was in excess of $5,000, the maximum recovery provided by the Act. The petitioner prayed judgment for the maximum amount [fol. 30] together with burial expenses also recoverable under the Act. Summons against the Construction Company was directed to the Sheriff of Knox County, Tennessee, and served by him in that county. Summons against the Surety Company was executed in Hawkins County, Tennessee.

On May 29, 1945, the two defendants filed their petition to remove the action to the United States District Court for the Eastern District of Tennessee. The petition alleged that the plaintiff was a citizen of Tennessee; that the corporate defendants were citizens of North Carolina and Connecticut; that at the time of the death of the decedent his average weekly wage was in excess of $30.00, and "that the amount in controversy in said cause of action exceeds the sum of $3,000 exclusive of interest, penalty and costs." On June 5, 1945, the removal order was entered by the state court.

On June 28, 1945, the defendants moved the District Court to dismiss the complaint for the reason that the Construction Company had at no time engaged in business in Hawkins County, Tennessee, nor had any officer or agent in that county upon whom process might lawfully be served; that the accident occurred in Roane County, Tennessee, where the Construction Company maintained its general offices and officers and agents upon whom process could be lawfully served, and that by reason of such facts the Court of Hawkins County, Tennessee, did not have jurisdiction of the alleged cause of action or of the defendants, the venue of said cause of action being limited to Roane County, Tennessee.

On July 12, 1945, the plaintiff moved the Court to remand the action to the state court on the ground that the action was not a removable one, that the petitioners for removal failed to give the necessary notice to the adverse party prior to filing the petition and bond for removal, as required by § 72, Title 28, U. S. C. A., and that the jurisdictional amount was not established by the pleadings.

On November 28, 1945, the Court rendered an opinion holding that under the Workmen's Compensation Act of Tennessee the employer may not be sued in a county where he has no officer, agent or place of business by serving process upon the insurer and that he could not be brought into the insurer's venue by counterpart process, that the Chancery Court of Hawkins County was not the proper venue, that removal from that court to the U. S. District Court for the Eastern District of Tennessee did not confer [fol. 31] jurisdiction upon the Federal Court, that the question of removability need not be passed upon, and since the District Court had no jurisdiction and in order to avoid the consumption of additional time the action would be dismissed. An order was accordingly entered on December 7, 1945, dismissing the action on the ground "that the Chancery Court of Hawkins County, Tennessee, whence the suit was removed to this court, did not have jurisdiction of the cause of action asserted in the pleading." This appeal followed.

Counsel discussed at some length the question of proper venue under the law of Tennessee and also whether or not sufficient notice was given of the filing of the petition to remove. But from the view which we take of the case, as hereinafter indicated, it becomes unnecessary to rule on those issues.

Plaintiff's recovery, if any, is controlled by the provisions of the Workmen's Compensation Law of Tennessee, as contained in §§ 6851-6901 of the Code of Tennessee. Although these statutory provisions are not pleaded either by the bill or by the petition of removal, yet the District Court and this Court take judicial notice of them. *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Norfolk & W. Ry. Co.* v. *Norton Iron Works*, 279 Fed. 32 (C. C. A. 6th). They provide that in all cases of death of an employee covered by the Act sixty percentum of the average weekly wages shall be paid in cases where the deceased employee leaves dependents, subject to maximum compensation of $18.00 per week, and a

total compensation not exceeding $5,000 exclusive of medical, hospital and funeral benefits. Burial expenses of the deceased employee are provided for not exceeding $150.00. Compensation is payable during dependency not exceeding 400 weeks, with payments to be made at the intervals when the wage was payable to the employee. Upon remarriage of the widow, if there is no child, compensation terminates, but if there is a child or children under the age of 18 such child or children shall have the status of orphans. An orphan receives compensation only during the time he or she is under 18 years of age. Under these circumstances we are of the opinion that the jurisdictional amount of $3,000, exclusive of interest and costs, is not involved. Although the bill seeks recovery of $5,000 and the petition for removal alleges that the amount in controversy exceeds $3,000 exclusive of interests and costs, yet such averments are not controlling where the claim is a liquidated one and as a matter of law the recovery can not possibly equal the jurisdictional amount. *North American Transporta-*
[fol. 32] *tion & Trading Co.* v. *Morrison*, 178 U. S. 262, 267; *Colorado Life Company* v. *Steele*, 95 Fed. (2d) 535 (C. C. A. 8th).

The situation involved is analogous to that in which recovery is sought under an insurance policy which provides for installment payments of a stated amount at regular intervals over an indefinite period in the future, such payments being subject to termination upon the happening of conditions subsequent such as discontinuance of total disability or death of the beneficiary. Under such a policy a cause of action accrues as each disability payment becomes due. *Everhart* v. *State Life Insurance Co.*, — Fed. (2d) — (C. C. A. 6th), decided April 2, 1946; *Aetna Life Ins. Co.* v. *Moyer*, 113 Fed. (2d) 974, 981 (C. C. A. 3rd). See also *New York Life Ins. Co.* v. *Viglas*, 297 U. S. 672, 678, 680, in which the Supreme Court said that where an insurance policy is not repudiated by the insurer the damages resulting from a refusal to pay do not exceed the benefits then in default. The writer of this opinion discussed the question in *Button* v. *Mutual Life Insurance Company of New York*, 48 Fed. Supp. 168 (W. D. Ky.), to which reference is made for a review of the authorities. In the present case only eleven weeks had elapsed from the day of the accident on March 8, 1945, to the filing of the action on May 24, 1945. The benefits due and in default at that time, if liability

existed at all, together with the burial benefits totaled less than $350.00. It is also uncertain, depending upon future events, that the total recovery, assuming liability is established, will ever amount to $3,000.00. The remarriage of the widow coupled with the death of the younger child would terminate the payments before they totaled that amount.

Section 80, Title 28 U. S. C. A. provides that if it appears to the satisfaction of the District Court at any time after removal that the suit does not substantially involve a controversy properly within the jurisdiction of the District Court, the "District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." The choice on the part of the District Judge between dismissal of the action and remanding it to the state court is discussed by the Supreme Court in *Employers Reinsurance Corporation* v. *Bryant*, 299 U. S. 374, at pages 381-382, where the Court approved an order to remand in preference to an order of dismissal. It was there pointed out that where further steps were available in the state court to obtain jurisdiction over the defendant, which did not exist in the District Court, [fols. 33-36] justice required that the plaintiff be afforded that opportunity rather than be permanently barred from doing so by an order of dismissal by the District Court. In the present case the plaintiff may obtain jurisdiction over both defendants by further proceedings in the state court if the action is remanded, but she would be barred from doing so if the action is dismissed. See *City of Knoxville* v. *Southern Paving Const. Company*, 220 Fed. 236 (E. D. Tenn.). Where the district court has pending before it both a motion to remand and a motion to dismiss, and the motion to remand is well taken, it is the better practice to remand the action and permit the motion to dismiss to be ruled upon by the state court where the action was originally filed and from which it was improperly removed. See *Anderson* v. *Sharp*, 189 Fed. 247, 249 (W. D. Tex.); *Olds* v. *Brown Shoe Company*, 25 Fed. Supp. 880 (W. D. Mo.) & *Ransom* v. *Sipple Truck Lines*, 52 Fed. Supp. 521, 526 (N. D. Ia.).

The order of the District Court dismissing the action is reversed, and the action remanded to the District Court for further proceedings consistent with this opinion.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

PETITION TO REHEAR—Filed April 24, 1946.

Appellees, Aetna Casualty & Surety Company and J. A. Jones Construction Company, respectfully represent that they are aggrieved by the holding of the Court as indicated in its opinion filed herein April 17, 1946, and that said holding is erroneous in the particulars hereinafter pointed out.

[fol. 38] This is a Tennessee Workmen's Compensation suit wherein appellant, the widow of the deceased employee, seeks to recover the maximum of $18.00 per week until she has received benefits aggregating $5000.00, also burial expenses in the amount of $150.00. At the time the suit was filed, benefits in the amount of less than $500.00 were due, and the Court has held that the jurisdictional amount requisite to removal from the State Court to the District Court is not present.

1. The situation here presented is not analogous to that in which recovery is sought of disability benefits under an insurance policy which are payable in stated amounts over an indefinite period of time. In such a case, the only relief that can be decreed by the Court is a recovery of the installments due on the date the suit is instituted, and a separate cause of action accrues as each disability installment becomes due thereafter. There, the jurisdictional question is necessarily resolved by the amount of the installments accrued at the date of suit.

A suit under the Tennessee Workmen's Compensation Act by a dependent of a deceased employee is not that kind of a case.

Code Section 6885 provides in part as follows:

> "In case of a dispute over or failure to agree upon compensation under this chapter between the employer and employee or the dependents of the employee, either party may submit the entire matter for determination
> • • •"

[fol. 39] Code Section 6892 provides:

> "All amounts paid by employer and received by the employee or his dependents, by lump sum payment, shall be final, but the amount of any award payable periodically for more than six months may be modified as follows * * *."

Code Section 6893 provides:

> "Any time after the amount of an award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may (where death or the nature of the injury renders the amount of future payments certain), by leave of Court, be paid by the employer to any savings bank or trust company of this State, to be approved and designated by the Court, and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer * * *. Payments from said fund shall be made by the Trustee in the same amount and at the same time as are herein required of the employer until said fund and interest shall be exhausted * * *."

In other words, the Legislature has provided, in unmistakable language, that in a compensation suit the judgment or award shall determine the entire controversy and shall adjudge the liability of the employer and its insurer for both past and future installments.

This Court will take judicial notice of the construction which the Tennessee courts have placed upon this Act. It will know that every award in favor of the plaintiff in a death case recites that the plaintiff recovers sixty per cent of the average weekly wage for four hundred weeks, or until the maximum of $5000.00 is reached. This latter sum, then, is the "amount in controversy."

2. The present decision cannot be reconciled with Thompson v. Thompson, 226 U. S. 551, 57 L. Ed. 347; Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 98, 79 L. Ed. 219, and Schunk v. Moline, etc., Company, 147 U. S. 499, 37 L. Ed. 255.

In Thompson v. Thompson, supra, the Supreme Court of the District of Columbia made an award in favor of the [fol. 40] wife in a suit for maintenance, the award being payable $75.00 per month. The Court of Appeals of the District reversed, and the wife perfected an appeal to the Supreme Court. The question was there made that the required jurisdictional amount of $5000.00 was not present, since that amount had not accrued. In upholding its jurisdiction, the Court said:

> "The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."
>
> Thompson v. Thompson, supra, p. 560.

The Pinkston case, supra, is directly in point and covers every issue upon which this Court has predicated its decision. In that case, the plaintiff, the widow of a deceased member of defendant Brotherhood, was entitled to receive a pension of $30.00 per month during her life, except that in the event of her remarriage, the pension was to cease. The Brotherhood became financially involved, and determined to abolish its Pension Department and to make a lump sum settlement of not to exceed $1500.00 with each widow on its pension rolls. Plaintiff brought suit in the Federal District Court to protect her rights. That Court held that the requisite jurisdictional amount was not present. In upholding jurisdiction, Mr. Justice Sutherland said:

> "The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.
>
> "This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to [fol. 41] preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.
>
> "In the Thompson Case, a decree had been entered by the Supreme Court of the District of Columbia in

favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the installments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560): 'The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.'

"The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension installments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the Thompson Case was fixed by decree, and subject to substantially like conditions subsequent. In the Thompson [fol. 42] Case the payments were subject to be cut off entirely, not only by death but, the court said, 'In the event of a change in the circumstances of the parties.' The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other."

Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, supra.

In the Schunk Case, supra, the plaintiff, under a Nebraska Statute, sued upon a series of promissory notes, of which only $530.09 were past due, together with the further sum of $1664.04 to become due in the future, and sought an attachment upon the ground that the defendant was about to fraudulently convey his property. Suit was commenced in the United States Court upon the ground of diversity of citizenship, and the jurisdiction of that Court was challenged because the required jurisdictional amount was not present. In upholding jurisdiction, the Court said:

> "It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by the demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute."
>
> Schunk v. Moline, etc., Company, supra, p. 504.

[fol. 43] The Schunk case is analogous to the case at bar, in that a statute authorized a judicial determination of the liability of the defendant in advance of the maturity of plaintiff's claim. The value of the unmatured part of the claim was taken into consideration in determining the question of jurisdiction. The Tennessee Workmen's Compensation Act has exactly the same effect.

3. A suit cannot be properly dismissed (and by the same token remanded to the State Court) on the ground that the subject matter is of less value than the jurisdictional amount, unless the facts made to appear on the record create a legal certainty of that conclusion.

Wetmore v. Rymer, 169 U. S. 115, 42 L. Ed. 682.

There are at least fifty Workmen's Compensation cases now pending upon the dockets of the Federal Courts in the Eastern District of Tennessee. They have been removed to those Courts upon the faith of the uniform construction of the Workmen's Compensation Act by the

Tennessee Courts to the effect that a suit under that Act adjudges the liability of the employer for future, as well as past, due installments, and upon the faith of the decisions of the Supreme Court of the United States herein cited. This Court has reviewed several such suits on their merits. The decision in the present case is a radical departure from long standing principles, and is without precedent.

We earnestly insist that the judgment of the District Court should be affirmed.

Respectfully submitted, Clyde W. Key, Counsel for Appellees.

[fol. 44] CERTIFICATE

The Aetna Casualty & Surety Company and J. A. Jones Construction Company, appellees herein, by their attorney, hereby certify that in their judgment and in the judgment of said attorney, the foregoing petition for rehearing is well founded and is not interposed for delay.

Clyde W. Key, Counsel for Appellees.

(All emphasis in quotations is ours.)

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Filed June 17, 1946

Appellees' petition for rehearing having been considered by the Court, and

The Court being of the opinion that the decision of the Supreme Court in Wright v. Mutual Life Insurance Company, 19 Fed. (2) 117; affirmed 276 U. S. 602, is more applicable to the facts of this case than are the decisions relied upon and referred to by the appellees, and since no lump sum payment as authorized by Section 6893 of the Tennessee Code has been agreed upon or adjudged in this controversy and accordingly is not involved herein,

It is ordered that appellees' Petition for Rehearing be and is now overruled.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 432

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8114)